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Supreme Court, U.S.
FILED
081199 MAR 25 2009
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No. ____

In the
Supreme Court of the United States

MICHAEL CHRISTOPH KREUTZER,

Petitioner,

v.

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
to the California Court of Appeal,
First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After eight years of steadily increasing responsibility and favorable evaluations, Petitioner was terminated from his employment as a Senior Physician Specialist by the Department of Public Health for the City and County of San Francisco. Despite a shortage of child psychiatrists and Petitioner's special skill as a fluent Spanish speaker, he was released with a note stating: "Your services are no longer needed." Petitioner was told that the dismissal was not disciplinary, but the City coordinated efforts to deny Petitioner any professional references regarding his eight years of employment with the City. As Petitioner sought a name-clearing hearing, the City disclosed that the basis for the dismissal was its belief that Petitioner was a racist since he diagnosed one Hispanic patient as a "malingerer." The questions presented are:

1. Whether a long-term government employee suffers a deprivation of liberty, protected by the Due Process Clause of the Fourteenth Amendment, when he is dismissed without stated reasons initially, but in such a manner as to ensure a likelihood that the charges against the employee's competence, professionalism, and morality, will become public and damage the employee's ability to work in his profession.

2. Whether a long-term government employee suffers a deprivation of liberty, protected by the Due Process Clause of the Fourteenth Amendment, when the city publishes the reasons for the dismissal in the course of the employee's attempts to secure a name-clearing hearing.

3. Whether an employee who has been deprived of liberty under the Due Process Clause of the Fourteenth Amendment when the city denies him a name-clearing hearing is entitled to compensation for damages proximately caused by that denial.

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The Order of the Supreme Court of California denying review is not published. That order is reproduced at Appendix C-1. The California Court of Appeal opinion is published at 166 Cal. App. 4th 306, 82 Cal. Rptr. 3d 644 (Cal. Ct. App. 2008) and is reproduced at Appendix A-1. The trial court's Statement of Decision and Judgment is not published. It is reproduced at Appendix B-1.

JURISDICTION

The California Supreme Court denied review of the court of appeal decision on December 10, 2008. Appendix C-1. On March 4, 2009, Justice Kennedy granted an extension of time to March 25, 2009, to file this Petition for Writ of Certiorari. Docket No. 08A770. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AT ISSUE

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

As this Court noted in *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972), "'where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'" Since that decision, government agencies have sought creative ways to avoid the necessity of defending their decisions in a name-clearing hearing,

and the courts of appeals and state courts have struggled to find an analysis that can be applied broadly to determine when a hearing is required. In the course of this struggle, a significant and long-lasting split between the circuit courts of appeals and state courts has developed over the question of what actions of the government constitute publication. This action squarely presents this split.

Petitioner is licensed medical doctor who is board certified in adult, child, and adolescent psychiatry. Appendix A-2. He is fluent is several languages, including Spanish—a skill that is especially valuable in California. *Id.*

In 1994 Dr. Kreutzer was hired by Respondent, City and County of San Francisco to be the medical director of the City's Southeast Child Family Therapy Center. *Id.* Although Petitioner supervised other employees in this and other positions with the City—the activity that defines a job as within the City's civil service system—the California appellate court ruled that as a matter of state law he did not have a civil service appointment since he was not initially classified as part of the civil service. Appendix A-7-9. This position was for 20 hours per week.

Dr. Kreutzer's tenure with the City was marked by advancement to positions of greater responsibility. His initial position required supervision of a staff of 20 including other medical professionals. A year later, Dr. Kreutzer was selected as the medical director of the Comprehensive Child Crisis Clinic. Appendix A-3. Initially, this position was for 10 hours per week with additional on-call emergency work. In 1999,

however, his time at this clinic was increased to 20 hours per week. While medical director at the Child Crisis Clinic, Dr. Kreutzer continued his duties as the medical director of the Southeast Child Family Therapy Center.

In 2002, the City added to Dr. Kreutzer's duties by appointing him medical director of the Mission Family Center. Appendix A-4. This center serves a Spanish-speaking population in San Francisco. Dr. Kreutzer continued to work as medical director for the Child Crisis Clinic and, until July of 2002, as medical director for the Family Therapy Center.

This steady increase in responsibility, however, came to a sudden halt in early September of 2002. On September 6, 2002, Dr. Kreutzer received a "Notice of Release" from the City informing him that he was being "released" from his appointment with the City and that his "services are no longer needed."

Officials in the City's Department of Public Health (Barbara Garcia and Dr. Katz) became aware that Dr. Kreutzer had diagnosed one Hispanic patient as a "malingerer." On the strength of this second-hand information, the City determined that Dr. Kreutzer was a racist and should be terminated from his positions with the City. Appendix B-6.

The City's goal in this process was to deny Dr. Kreutzer a hearing. Before terminating Dr. Kreutzer, Garcia consulted with the civil service department to determine how to deprive Dr. Kreutzer of a hearing at which he might have an opportunity to contest charges against him. Appendix B-5. Based on the advice received, City officials described the termination as "non-

disciplinary." Appendix A-5. However, Barbara Garcia also coordinated an effort to ensure that Dr. Kreutzer would receive no professional references for his eight years of work for the City. Appendix B-7. Any prospective employers would be informed of only Dr. Kreutzer's dates of employment with the City. Dr. Kreutzer's supervisors were instructed not to provide any other information about his tenure with the City. The trial court found that these actions "severely compromised" Petitioner's ability to earn a living. Appendix B-15.

Dr. Kreutzer sought to reverse this termination or at least to erase the stain on his professional reputation caused by the dismissal coupled with the refusal to provide reference information. First he pursued a grievance through the union. That was unsuccessful when the arbitrator agreed with the City that Dr. Kreutzer's position was not protected by the civil service laws. Appendix A-5.

Because the City had discharged him without a reason and then prohibited other City employees from giving him a professional reference for the past eight years of his medical practice, Dr. Kreutzer was forced to disclose and discuss the City's "racism" allegations against him each time he met a potential employer. The City's apparent effort to blacklist Dr. Kreutzer was particularly effective in that prospective employers must extend a child psychiatrist an inordinate level of trust. The trial court ruled that firing a medical professional after eight years and then withholding professional references "is a kiss of death for that professional as it will be assumed that the applicant is incompetent, immoral, or worse." Appendix B-9.

Dr. Kreutzer next sought to clear his name through a hearing before the City civil service commission. Again, however, his efforts were rebuffed. Indeed, rather than clearing his name his unsuccessful efforts to obtain a hearing resulted in the City's disclosure that it believed Dr. Kreutzer made racist comments. Appendix A-22. The charges of racism stem from Dr. Kreutzer's diagnosis of a Hispanic patient as a "malingerer." Petitioner has steadfastly contested the charge that he harbors any racial animus. He was denied an opportunity for a hearing at which he could refute the accusations. Appendix B-6.

Left without any practical alternative to clear his name and reclaim his reputation, Dr. Kreutzer filed this action in San Francisco Superior Court. The case did not originally include a claim of due process. That claim was added by a pleading amendment in May of 2006.[1]

The case was heard by the court sitting without a jury. At the close of testimony, the trial court ruled that "there were substantial property and liberty

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[1] Petitioner had originally moved to file an explicit claim of denial of due process under the federal constitution. That motion to amend the complaint was denied. The later, successful amendment referred to the right to due process under the California Constitution. However, the trial court expressly ruled on the federal due process violation. Appendix B-6. In any event, California pleading rules require the pleading of facts—not legal claims. Under state pleading rules, "[t]he cause of action is based on the *injury* to the plaintiff, and not the particular legal theory of the defendant's wrongful act." 4 B. E. Witkin, *California Procedure* 88 (1997); *see Clark v. Yosemite Cmty. Coll. Dist.*, 785 F.2d 781, 784 (9th Cir. 1986).

interests at stake under the California and United States Constitutions." Appendix B-6. The City deprived Dr. Kreutzer of these liberty and property interests without due process of law when it terminated him without a prior hearing and when it denied him a hearing at which he could contest the charges leveled against him. As a remedy, the court ordered Dr. Kreutzer reinstated to City employment.

On appeal, the California Court of Appeal for the First Appellate District reversed the judgment of the trial court. First, the court of appeal ruled, based on state law, that Dr. Kreutzer had no property interest in his tenure as a City employee. Appendix A-17. According to the court, it did not matter that his position should have been covered by the civil service based on his actual job duties. So long as he was originally hired as an "exempt" employee he could not claim civil service protection. Appendix A-9. This was true even if, as here, the hiring and interview process that Dr. Kreutzer went through differed in no appreciable respect from the one for a civil service position.

Of note here, the state appellate court also ruled that Dr. Kreutzer suffered no deprivation of liberty. The court rested its conclusions on the fact that "no stigmatizing charges were publicly disseminated" at the time of the dismissal from City employment. According to the court, no stigma attached by reason of the coordinated effort to deny Dr. Kreutzer professional references for his eight-year tenure with the City since he was able to get references from "other sources." Appendix A-21 n.10. The court further ruled that he was not damaged by the dismissal in any event since he was able to obtain

part-time employment in three different cities that together sometimes equated to full-time employment. Appendix A-6, 24. In any event, according to the court the only remedy for a denial of liberty under the Due Process Clause in this instance is a name-clearing hearing. The court noted that California courts do not permit the award of damages for the violation of due process. Appendix A-20 n.9.

Dr. Kreutzer's petition to the California Supreme Court for review was denied without comment. Appendix C-1. Dr. Kreutzer now petitions this Court for a writ of certiorari to resolve the conflict between the circuits on what constitutes "publication" of the stigmatizing charges sufficient to trigger a denial of liberty under the Due Process Clause.

REASONS FOR GRANTING THE WRIT

I. THERE IS A LONG-STANDING SPLIT BETWEEN THE CIRCUITS AND BETWEEN STATE HIGH COURTS ON THE NATURE OF THE PUBLICATION REQUIRED TO SUPPORT A DUE PROCESS CLAIM

The California appellate court ruled that the City's action in denying professional references did not matter so long as there was no initial publication of the stigmatizing charges. In making this ruling, the court further exacerbated a long-standing split between the circuits and state courts on the issue of publication. This split was noted in 1997 by the Seventh Circuit in *Olivieri v. Rodriquez*, 122 F.3d 406 (7th Cir. 1997):

This case is unusual because there is no evidence that the defendant disclosed to anyone the grounds of the plaintiff's discharge. The plaintiff argues that this makes no difference to his employability because no police department will hire him without asking him why he was fired by the Chicago Police Department. If he answers truthfully, he will reveal the grounds of the termination as effectively as (actually more effectively than) if the Department had taken out a full-page ad in every newspaper in the nation announcing the termination of Felix A. Olivieri for sexually harassing female probationary officers at the Chicago police training academy. This type of argument has persuaded three circuits that dissemination by the defendant in a case such as this is not required after all. *Donato v. Plainview-Old Bethpage Central School District*, 96 F.3d 623, 631-32 (2d Cir. 1996); *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41, 45 (2d Cir. 1987); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980); *Buxton v. City of Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989). Our court, however, insists on dissemination, *e.g.*, *Johnson v. Martin*, *supra*, 943 F.2d at 16-17 (explicitly rejecting *Brandt*); *Ratliff v. City of Milwaukee*, 795 F.2d 612, 627 (7th Cir. 1986), as do the First and Third

> Circuits. *See Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74-75 (1st Cir. 1990); *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148 (3d Cir. 1988). The Fifth and Eighth have hedged, *Hogue v. Clinton*, 791 F.2d 1318, 1322-23 n.7 (8th Cir. 1986); *Burris v. Willis Independent School District, Inc.*, 713 F.2d 1087, 1092 (5th Cir. 1983), and the others haven't addressed the issue.

Id. at 407-08. As noted by one judge on the Fourth Circuit two years ago "to say there is a circuit split is at once true and not indicative of the full extent of the problem." *Sciolino v. City of Newport News, Va.*, 480 F.3d 642, 655 (4th Cir. 2007), (Wilkison, J., dissenting). The Court should grant review to resolve this split that has perplexed the circuit courts.

A. The Second, Fourth, Ninth, and Eleventh Circuits and the New York Court of Appeals Have Held that Varying Types of Self-Publication Are Sufficient to Trigger Due Process

In *Bishop v. Wood*, 426 U.S. 341 (1976), this Court noted that a claim for invasion of a liberty interest under the Due Process Clause requires publication of the stigmatizing allegations. *Id.* at 348. The circuit courts continue to debate what constitutes publication. The Second, Fourth, Ninth, and Eleventh Circuits, and the New York Court of Appeals have all agreed that the agency's initial silence on the reasons for the termination is not dispositive. A letter placed in the employee's

personnel file can satisfy the "publication" requirement if the employee can show some likelihood of eventual disclosure.

The Second Circuit approaches this question by noting that the "purpose of the [publication] requirement is to limit a constitutional claim to those instances where the stigmatizing charges made in the course of discharge have been *or are likely to be* disseminated widely enough to damage the discharged employee's standing in the community." *Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 44 (2nd Cir. 1987) (emphasis added). Thus, even if the reasons for the discharge are not initially disclosed, the employee can base a claim on the likelihood of future disclosure. *Id.* at 45; *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 631-32 (2nd Cir. 1996).

The New York Court of Appeals also follows this rationale. That court has held that the bar to "pre-dissemination compensatory relief does not apply" when the employee is seeking a name clearing hearing or equitable relief to prevent the release of the information. *Swinton v. Safir*, 93 N.Y.2d 758, 764; 720 N.E.2d 89, 92-93 (N.Y. 1999). The New York Court still requires a demonstration that there is a likelihood that the information will eventually be disseminated.

The Fourth, Ninth, and Eleventh Circuits follow this rationale. In *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037, 1045 (11th Cir. 1989) the court held that the employee could proceed with a due process claim where information placed in the personnel file was open to potential future employers. The Ninth Circuit similarly turned to state law to determine

whether information placed in the personnel file was subject to future disclosure. *Cox v. Roskelley*, 359 F.3d 1105, 1110 (9th Cir. 2004). Because state law did not prohibit disclosure of the information, the Ninth Circuit agreed that placing information in the file met the requirement for "publication."

The Fourth Circuit is the court to have visited the issue most recently. Taking a somewhat more expansive approach, that court noted that a "plaintiff need not allege that his file has actually been disseminated to particular prospective employers" so long as the employee can show a likelihood of future disclosure. *Sciolino*, 480 F.3d at 650.

Each of these decisions recognized a due process violation on the basis of a possible or likely *future* publication. The common theme is that the government agency had set in motion a chain of events that would result in disclosure of the stigmatizing information—while denying the employee the opportunity to challenge the allegations. The agency action in these cases put the employee at extreme disadvantage—the information may have been initially private, but it was placed where it would be discovered and damage the employee's ability to secure future employment.

This case is no different. Although there was no physical piece of paper placed in a personnel file, the City's actions were in fact more damaging to Dr. Kreutzer. The allegations against him were apparently common knowledge in the City department—indeed, the second-hand retelling of the allegations is how the information came to the attention of the officials responsible for the termination. Appendix B-6. The coordinated efforts

to deny Dr. Kreutzer any references for his eight years of service to the City only served to magnify the stories in the City rumor mill. The City's actions ensured that the allegations would eventually come to light and damage Dr. Kreutzer's reputation and ability to work in his chosen profession. In any event, the City disclosed the information in response to Dr. Kreutzer's attempts to gain a name-clearing hearing from the City. Unlike the employees in the cases described above, Dr. Kreutzer does not live in fear that the false allegations may someday become public—he instead must live with the consequences of the actual publication.

B. The First, Third, Fifth, and Seventh Circuits Agree with the California Appellate Court that Only Government Publication Will Invoke the Protections of the Due Process Clause

The First, Third, Fifth, and Seventh Circuits all require actual publication. These courts have all ruled that possible future publication is not enough to gain the protection of the Due Process Clause. In these circuits, employees have no protection under the Constitution until their reputations have actually been destroyed.

The Seventh Circuit has reviewed the cases noting possible or likely future publication and has explicitly rejected that analysis. In *Johnson v. Martin*, 943 F.2d 15, 16-17 (7th Cir. 1991), the Seventh Circuit expressly rejected the rationale put forward by the Second Circuit in *Brandt*, 820 F.2d at 45. The Seventh Circuit opined that the standard of "likely" public disclosure was inconsistent with this Court's holding in *Bishop*. *Johnson*, 943 F.2d

at 16. The Seventh Circuit again surveyed the views of other Circuit Courts of Appeals on this issue and again reaffirmed its position on the split in *Olivieri*, 122 F.3d at 408-09.

Similarly, the First Circuit has held that placement of the information in the employee's personnel file is not actionable under the Due Process Clause. Instead, the employee must prove that the information has actually been disclosed to potential employers. *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74-75 (1st Cir. 1990). This is also the view of the Third Circuit as expressed in *Copeland v. Phila. Police Dep't*, 840 F.2d 1139, 1148 (3rd Cir. 1988).

The most recent decision on this side of the circuit split came from the Fifth Circuit. Like the Seventh Circuit, the Fifth Circuit expressly acknowledged the circuit split in *Hughes v. City of Garland*, 204 F.3d 223, 228 (5th Cir. 2000). After surveying the competing decisions, the *Hughes* court ruled that actual publication, rather than possible future publication or compelled self-publication, was required to state a Due Process claim.

C. The Eighth and Tenth Circuits Treat the Question as an Open Issue

Still other courts have yet to conclude which side of the split they will take. The Eighth Circuit has noted that the presence of stigmatizing information in the personnel file "may be a sufficient publication" if the information is made available to prospective employers. *Hogue v. Clinton*, 791 F.2d 1318, 1322 n.7 (8th Cir. 1986).

The Tenth Circuit in *Bailey v. Kirk*, 777 F.2d 567, 573 n.8 (10th Cir. 1985) refused to indicate whether publication of the stigmatizing information in the local press was sufficient to trigger Due Process rights to a hearing. In that case, the plaintiff failed to include the text of the news stories in the record, thus depriving the court of the opportunity to review the question.

The split between the circuits on this question of publication has persisted almost since this Court's decision in *Bishop*. This split is deep and long-lasting. Further review in the circuits is unlikely to resolve the split. Action by this Court is necessary to bring uniformity to the law on this important Due Process question.

II. THE CALIFORNIA COURT'S RULING THAT DAMAGES ARE NOT AVAILABLE FOR DUE PROCESS VIOLATIONS OF THIS TYPE HIGHLIGHTS A CONFLICT BETWEEN THE CALIFORNIA SUPREME COURT AND THE CIRCUIT COURTS OF APPEALS ON THIS ISSUE

A. The Court Below Ruled that California's Supreme Court Prohibits an Award of Damages for Denial of Liberty Without Due Process of Law

In addition to finding no denial of liberty without Due Process of Law, the court below also ruled that California authority precluded the award of damages for this type of a Due Process violation. Instead, the employee is limited to a "name-clearing" hearing only. Appendix A-20 n.9. To reach this conclusion, the court below relied on a decision of the

California Supreme Court in *Katzberg v. Regents of the Univ. of Cal.*, 29 Cal. 4th 300, 329; 58 P.3d 339, 358 (Cal. 2002). The *Katzberg* court, however, merely ruled that the California Constitution did not support an independent cause of action for damages. The decision has nothing to say about the availability of damages for violation of due process rights protected by the Fourteenth Amendment. The court of appeal also claimed support for its ruling in this Court's decision in *Roth*, 408 U.S. at 573. Appendix A-20 n.9.

The published decision of the court below establishes a precedent that sets California apart from other federal courts that have considered the questions of damages. This Court should grant review to resolve this conflict.

B. The First, Second, Fifth, and Ninth Circuits Recognize that a Denial of Liberty Without Due Process Can Support an Award of Compensatory Damages

In contrast to the ruling below, the federal circuits that have considered the question have ruled that compensatory damages are available for a denial of liberty without due process of law. The Second Circuit had recent occasion to publish its first opinion on this issue:

> We have not had occasion to rule directly on the issue of what kind of damages a stigma-plus plaintiff may recover if a defendant fails to provide him with a sufficient name-clearing hearing and the seminal cases of *Davis*

> and *Roth* simply state what circumstances give rise to the right to the name-clearing hearing, and not what damages are proper if that right is not fully accorded plaintiff."

Patterson v. City of Utica, 370 F.3d 322, 338 (2nd Cir. 2004). The court recognized that at some point, the refusal of the agency to grant a name-clearing hearing will impose additional damages on the plaintiff. Thus, the court concluded that an employee that was denied due process in such a case should have the right to prove those damages and receive appropriate compensation as part of the award. *Id.* Other circuits have come to a similar conclusion. *Stidham v. Tex. Comm'n on Private Sec.*, 418 F.3d 486, 492 n.9 (5th Cir. 2005) ("anticipated profits may be considered as a measure of damages for the deprivation of a constitutional liberty interest."); *Hughes*, 204 F.3d at 226; *Brady v. Gebbie*, 859 F.2d 1543, 1551 (9th Cir. 1988) ("This court and the Supreme Court have repeatedly held that the appropriate remedy for deprivation of liberty and/or property interest without due process is to order the process that was due and any attendant damages which directly resulted from the failure to give the proper procedure."); *Rodriguez de Quinonez v. Perez*, 596 F.2d 486, 491 (1st Cir. 1979) (damages may be proper where lapse of time renders hearing ineffectual.).

This Court should review this case to heal this breach before it spreads. Individuals in California who have been denied a liberty interest without due process ought to be entitled to the same damages

remedy available in the First, Second, Fifth, and other states of the Ninth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: March, 2009.

Respectfully submitted,

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Appendix A

Court opinion certified for publication. Filed August 26, 2008 in the California Court of Appeal, First Appellate District, Division Four.

Appendix B

Court statement of decision and judgment. Filed December 1, 2006 in the San Francisco County Superior Court.

Appendix C

Court order denying petition for review. Filed December 10, 2008 in the Supreme Court of California.

Appendix A-1

Filed 8/26/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MICHAEL CHRISTOPH KREUTZER, Plaintiff and Respondent, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant and Appellant.	A116389 (City and County of San Francisco Super. Ct. No. CGC-04-431522)

In this opinion, we conclude that a government employee hired into a position expressly classified as exempt from civil service is not entitled to the protections of the civil service system upon the employee's release from the position, even if a court finds that, based on the duties of the position, it should not have been classified as exempt. We also hold that where a government employee is released from employment for reasons characterized only as non-disciplinary, and not otherwise publicly disclosed, the employee's liberty interest in reputation has not been infringed, and the employee is entitled to no relief. Accordingly, we reverse the

trial court's judgment in this case, which ordered a government employer to reinstate a former exempt employee into a non-exempt position.

I. FACTS AND PROCEDURAL BACKGROUND

Dr. Michael Kreutzer, the respondent on this appeal, is a licensed physician who is board certified in both adult psychiatry and child and adolescent psychiatry. He is fluent in Spanish, French, and German, as well as English.

Dr. Kreutzer was first hired by appellant City and County of San Francisco (City) in 1994, as the half-time medical director of the Southeast Child Family Therapy Center (Southeast). The process by which Dr. Kreutzer was hired for this position included an interview with Dr. Albert DeRanieri, an exempt medical director for the City who also worked part-time at Southeast, as well as interviews with other City personnel. However, Dr. Kreutzer did not take a formal, posted civil service examination for his position, and was not placed on or hired from an eligible list.

The position to which Dr. Kreutzer was appointed in 1994 was classified by the City's Civil Service Commission (Commission) as falling within class 2230, Physician Specialist, which is exempt from the City's civil service system. When he was hired, Dr. Kreutzer signed an "Appointment Processing" form indicating that he was an "exempt-perm[anent]" employee, but the form did not have the box for "non-civil service" checked.[1] Dr. Kreutzer

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[1] While testifying about a similar "non-civil service" box on a different City personnel form, the Commission's executive

— *continued* —

served what he understood to be a probationary period, and did not understand what "exempt" meant, nor that he was an at-will employee, nor that his position was anything other than a permanent one.

At Southeast, Dr. Kreutzer provided clinical supervision to a staff of about 20 people, including both medical professionals and unlicensed staff. His duties included participating in evaluations of staff, monitoring the quality of treatment, and attending administrative meetings. However, he also spent a significant portion of his time delivering direct services to patients. Moreover, he admittedly did not have any authority to hire, fire, or discipline any staff members.

About a year after he started working for the City at Southeast, Dr. Kreutzer interviewed for an additional part-time position as medical director of Comprehensive Child Crisis Services, also known as the Comprehensive Child Crisis Clinic (Child Crisis). Dr. Kreutzer was selected for the position, and in November 1995, he began working about 10 hours a week at Child Crisis, plus additional on-call hours for emergencies. Although Dr. Kreutzer interviewed for this position, nothing in the record indicates that he took a posted examination for the position; was

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director, Kate Favetti, explained that this box is checked only on those rare occasions when an appointment is made to a position within the civil service, but the appointment is not made through the normal civil service process because no eligible list is available. (See San Francisco Civil Service Commission Rules (SF CSC Rules), rule 114.22 [defining "Non-Civil Service Appointment" as a temporary appointment made where there is no suitable list].)

placed on or hired from an eligible list; or served a probationary period.

In late 1999, Dr. Kreutzer's hours at Child Crisis were increased to 20 hours per week, in addition to his ongoing responsibilities at Southeast. At about the same time, he was given a pay raise, and promoted to a position in class 2232, Senior Physician Specialist. This position was also classified by the Commission as exempt from the civil service system. Dr. Kreutzer was not selected for this position from an eligible list, and did not serve a probationary period. He again signed an "Appointment Processing" form indicating that his position was "exempt-perm[anent]," but again, he neither understood nor asked what "exempt" meant in that context.

In the spring of 2002, Dr. Kreutzer became the medical director of Mission Family Center, which serves a primarily Spanish-speaking population. He worked there 20 hours a week, while also continuing to work as the medical director at Child Crisis and (until mid-July 2002) at Southeast. His position as a class 2232 Senior Physician Specialist did not change as a result of these changes in his work assignments.

In February and March 2002, Dr. Kreutzer also obtained first temporary, and then permanent, clinical privileges at San Francisco General Hospital (SF General), by virtue of his employment in a part-time position, under the auspices of the University of California, San Francisco (UCSF), as a psychiatrist at SF General. At this time, Dr. Kreutzer also worked occasionally at Westside Community Mental Health Center and Westside Crisis Clinic (Westside).

On September 6, 2002, Dr. Kreutzer received from the City a document entitled "Notice of Release from Exempt Appointment" (release notice). The release notice informed him that he would be "released from [his] exempt appointment in Class 2232 Senior Physician Specialist. Your services are no longer needed." The release notice was accompanied by a separation report stating that Dr. Kreutzer's position was "permanent exempt" and that his release was "non-disciplinary."

Dr. Kreutzer challenged his release through his union, which filed a grievance and arranged for an arbitration. The arbitrator ruled, however, that because Dr. Kreutzer's release was non-disciplinary, he was not entitled to a hearing to challenge the release under the applicable collective bargaining agreement.

Dr. Kreutzer also appealed his release to the Commission, contending that his positions involved significant administrative and supervisory duties, and that he was therefore entitled under the Charter to receive the protections of the civil service system. The City's Department of Human Resources and the Commission both informed Dr. Kreutzer that because he had been released from an exempt position, the Commission had no authority to reverse the decision and would not grant a hearing. The Commission also explained to Dr. Kreutzer that it had no jurisdiction to review his release because no restrictions had been placed on his future employment with the City.

After his release from his employment with the City, Dr. Kreutzer increased his hours at SF General and Westside, and also sought other work. During

the first half of 2003, Dr. Kreutzer worked from 12 hours a week up to as much as 94 percent of full time as a UCSF physician stationed at SF General. During this time, no restriction or reduction was imposed on Dr. Kreutzer's clinical privileges at SF General. In June 2003, however, UCSF discharged Dr. Kreutzer from the medical staff employed by UCSF at SF General. Subsequent to Dr. Kreutzer's discharge by UCSF in June 2003, SF General revoked his clinical privileges.

After leaving UCSF, Dr. Kreutzer worked simultaneously as a half-time child psychiatrist for Contra Costa County, and as the medical director of a private sector residential treatment program called STARS. As of the time of trial, he was still working 8 hours a week for STARS; was the medical director of Starlight Adolescent Center in San Jose, where he worked 20 to 30 hours a week; and worked up to 4 hours a week at the Burt Children's Center in San Francisco. He also served on the clinical faculty at UCSF and maintained a private practice, though he did not have any patients as of the time of trial.

On May 18, 2004, Dr. Kreutzer filed the complaint in this litigation against the City. On May 12, 2006, he filed an amended complaint, which pleaded causes of action for retaliatory discharge and violation of due process. The parties stipulated that the issue of the timeliness of the complaint, including the City's laches defense, would be tried to the court, sitting without a jury, along with Dr. Kreutzer's cause of action for violation of due process. Following the conclusion of the trial, after the trial court announced its findings orally on the record, Dr.

Kreutzer voluntarily dismissed the remaining cause of action in his complaint.

On December 1, 2006, the trial court filed a statement of decision and judgment finding in Dr. Kreutzer's favor both as to the timeliness of the complaint[2] and as to the merits, and ordering Dr. Kreutzer reinstated with back pay. The City's timely appeal ensued.[3]

II. DISCUSSION

A. Exemption from Civil Service Protection

As revised in 1994, the City's Charter provides, in section 10.104, that "[t]he following positions shall be exempt from competitive civil service selection, appointment and removal procedures, and the person serving in the position shall serve at the pleasure of the appointing authority: [¶] . . . [¶] . . .

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[2] The trial court concluded that Dr. Kreutzer's complaint was timely filed under Government Code section 945.6, despite the lapse of time between the denial of Dr. Kreutzer's claim under the Government Tort Claims Act and the filing of the complaint, because the court found that Dr. Kreutzer's attorney never received the claim denial letter. The court did not address the City's laches defense, however. In light of our disposition of this appeal on the merits, we deem it unnecessary to reach this issue.

[3] The trial court later issued an order awarding Dr. Kreutzer his attorney fees, from which the City also timely appealed (the attorney fees appeal). (*Kreutzer v. City and County of San Francisco* (A120530, app. pending).) On June 24, 2008, we granted the City's motion to stay briefing in the attorney fees appeal pending resolution of the instant appeal on the merits. In light of our disposition herein, we will enter a separate order in the attorney fees appeal dismissing it as moot.

physicians and dentists serving in their professional capacity (except those physicians and dentists whose duties are significantly administrative or supervisory)." (S.F. Charter, § 10.104.) In 1988, the Commission determined, under the predecessor to this provision, that the duties of physicians in class 2232 (which included the position Dr. Kreutzer held at the time of his release) were primarily clinical rather than supervisory and administrative, and that class 2232 should therefore be an exempt classification.

In the present case, the trial judge found as a factual matter that Dr. Kreutzer did in fact have significant supervisory and administrative duties, and concluded based on that fact that Dr. Kreutzer was not exempt from the civil service system, and therefore had a right to a hearing under civil service procedures before being removed from his position. The finding that Dr. Kreutzer had significant supervisory and administrative duties is supported by substantial evidence, and under the applicable standard of review, we cannot disturb it. (*Veguez v. Governing Bd. of the Long Beach Unified School Dist.* (2005) 127 Cal. App. 4th 406, 414.) The trial court's conclusion that Dr. Kreutzer was therefore not exempt from the civil service system, however, is a question of law that we review de novo. (*Sacramento County Alliance of Law Enforcement v. County of Sacramento* (2007) 151 Cal. App. 4th 1012, 1017 ["'[T]he proper interpretation of civil service rules is subject to de novo review as a pure question of law' under 'the same general rules [of construction and interpretation] that are used for statutes.'. . ."]; see also, e.g., *Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization* (2008) 160 Cal. App. 4th

514, 520 ["The interpretation of a statute or a regulation presents a question of law and, accordingly, . . . is subject to de novo judicial review."]; *Rex Club v. Workers' Comp. Appeals Bd.* (1997) 53 Cal. App. 4th 1465, 1470-1471 ["the construction of a statute and its applicability to a given situation are matters of law that are reviewable by the courts"].)

In effect, the trial court ruled that a position classified as exempt by the Commission had been transformed into a non-exempt position by virtue of the incumbent's performance of duties that, under the applicable charter provision, are characteristic of a non-exempt position. Longstanding precedent compels us to reject this conclusion as erroneous. It has been the law in California, at least since 1938, that a fundamental principle of the civil service system is that employees do not become entitled to occupy positions in classifications other than the ones to which they were appointed merely by virtue of having been assigned duties that properly belong to a higher classification, and that if the rule were otherwise, "the entire fabric of the civil service system would fail." (*Pinion v. State Personnel Board* (1938) 29 Cal. App. 2d 314, 319.)

For that reason, "[a]ttempts by individuals and agencies to circumvent the civil service hiring rules have been repeatedly struck down. [Citations.]" (*Snow v. Board of Administration* (1978) 87 Cal. App. 3d 484, 488 (*Snow*); see also, e.g., *Bell v. Duffy* (1980) 111 Cal. App. 3d 643, 648-650.) In *Snow*, for example, a state employee who had been awarded compensation for performing the duties of a higher class than the one to which he was assigned

contended that the compensation must be taken into account in computing his retirement benefits. The court rejected this claim, noting that the employee had never taken a competitive examination for, or been appointed to, the higher level position, and that "the mere assumption and performance of the duties of a higher classification cannot require that the employee be appointed to it." (*Snow, supra*, 87 Cal. App. 3d at p. 489.)

Similarly, in *Otto v. Reardon* (1937) 21 Cal. App. 2d 260 (*Otto*), the court rejected a petition for writ of mandamus by an employee of the State of California who contended that her position should be reclassified to a higher one because her duties had changed. In so holding, the court opined that "[i]t would obviously be destructive of the very principles upon which the civil service system is founded to promote [an employee] . . . without an examination as to the qualifications of the candidate" for the higher position. (*Id.* at p. 262.) Instead, as the court noted, the State Civil Service Commission had provided by rule that when the duties of a position are substantially changed, the remedy is to reclassify the position; hold an examination for the reclassified position; and fill it from an eligible list.[4] (*Id.* at p. 265.)

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[4] This is the procedure that Edward Gazzano, the human resources director of the City's Department of Health, testified would apply if an exempt physician in the same class as Dr. Kreutzer sought to have his or her position reclassified based on the contention that its duties were sufficiently administrative and supervisory to warrant non-exempt status under the City's charter. The Commission's rules provide a procedure for reclassification of positions when the

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The policy reasons behind the rule that a change in actual duties cannot result in the de facto reclassification of an employee were explained in *Ligon v. State Personnel Bd.* (1981) 123 Cal. App. 3d 583 (*Ligon*). In *Ligon*, a state employee contended that she had been assigned, and had performed, "out-of-class" duties, and that her resulting actual experience should have been recognized by the State Personnel Board as qualifying her to take an examination for a higher position, even though the duties of her actual position did not enable her to meet the minimum qualifications. In holding that out-of-class experience could not be relied upon to qualify an employee to take an examination, the court noted that "[p]aramount to a fair, equitable and complete [civil service system] is an advancement and promotion plan based upon compliance with the statutes and applicable regulations." (*Id.* at pp. 590-591.) The court went on to explain that "[t]o permit out-of-class experience to be substituted for the minimum [in class] experience would permit different appointing powers to short-cut the merit system by assigning higher class duties to employees, thus shortening the experience requirements for admission to the promotional examinations. Those who attain out-of-class status could swiftly bypass other candidates who are dutifully performing their tasks according to their job classifications. Unfairness and acrimony could result." (*Id.* at p. 591.)

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responsibilities of the position "are no longer consistent with the existing class . . . ," and for an appeal to the Commission by an employee affected by any classification action. (SF CSC Rules, rules 109.1.3, 109.2.1.)

Dr. Kreutzer attempts to distinguish cases such as *Otto*, *supra*, 21 Cal. App. 2d 260, and *Ligon*, *supra*, 123 Cal. App. 3d 583, on two grounds: first, that unlike the employees in those cases, who asserted the right to civil service protection based on *changes* in their assigned duties, Dr. Kreutzer was assigned administrative and supervisory duties from the very start of his employment by the City; and second, that in this case, unlike in *Otto* and *Ligon*, there was a provision in the city charter under which his position should have been classified as non-exempt. We are not persuaded by these arguments.[5]

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[5] We also are not persuaded by Dr. Kreutzer's citation of *Haas v. City of Los Angeles* (1942) 21 Cal. 2d 393. That case involved a city charter provision establishing pensions for all civil service employees of the Fire Department " 'whose duty it is to prevent or extinguish fires . . . under whatever designation . . . [the employee] may be described . . . .' " (*Id.* at p. 394.) The plaintiff was an employee of the Los Angeles Fire Department who was concededly " 'duly and regularly appointed . . . under civil service rules' " (*ibid.*), and who had accumulated enough years of service and contributions to the fire department's pension fund to qualify for a pension. Nonetheless, the city declined to pay him a pension on the ground that he had been classified under the civil service rules as a painter rather than as a firefighter.

The Supreme Court interpreted the charter provision to require that pensions be paid to all civil service employees, regardless of job title, "whose duties have a substantial connection with fire prevention or fire extinguishment . . . ." (*Haas v. City of Los Angeles*, *supra*, 21 Cal. 2d at p. 394.) Noting that the plaintiff had tested and maintained firefighting equipment, and had even helped to put out fires on occasion, the court held that he was entitled to a pension under the language of the charter. (*Id.* at p. 395.) Thus, the *Haas* court's statement that "it is not the civil service status of an employee which determines his right under the charter" (*id.* at p. 394), — *continued* —

Even taken together, they show only that Dr. Kreutzer's position might more properly have been originally classified as non-exempt by the Commission.[6] The remedy for such misclassification, however, is an application to the Commission for reclassification of the position, not a post hoc decision by a court to grant civil service protection to an exempt employee who did not go through the civil service hiring process before being appointed to the position.

The trial judge adopted Dr. Kreutzer's position on this issue in part based on findings that (1) Dr. Kreutzer's appointment process did not differ substantively from the civil service hiring process; and (2) the City did not introduce evidence that any physician in an exempt position had in fact applied for and received reclassification to a non-exempt position. The first of these findings is not supported by substantial evidence, and the second is irrelevant.

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read in context, merely meant that the court interpreted the charter's language as granting the right to a pension to all civil service employees with any firefighting-related duty, regardless of their official civil service job titles. This does not in the least undercut or contradict the substantial body of prior or subsequent case law, discussed in text, holding that a non-civil service position cannot be transformed into a civil service position merely by assigning out-of-class duties to its occupant.

[6] We note, however, that the Commission has broad discretion in assigning positions to classifications. (See *Otto*, *supra*, 21 Cal. App. 2d at p. 266 ["The board has a sound discretion in determining . . . whether the addition of certain duties requires a reclassification of [a] position. Unless there is a clear abuse of discretion in that regard we may not interfere with the province of the board by means of mandamus or otherwise." (Italics omitted.)].)

The record does reflect that the examination process undergone by Dr. Kreutzer, which involved nothing more than a review of credentials and a series of interviews, is the same process that is utilized by the Commission for its civil service *examination* process when dealing with licensed professionals. However, that does not mean that the overall *hiring* process was the same for Dr. Kreutzer as it is for civil service positions. Under the applicable Commission rules, hiring for a non-exempt position requires a number of procedural steps in addition to an examination. The availability of an examination for the position must be posted; candidates who complete the examination must be placed on a ranked eligible list; the appointee must be selected from among candidates who are within a certain range on the eligible list (normally the top three); and the appointee must serve a probationary period. (S.F. Charter, §§ 16.116, A8.329; SF CSC Rules, rule 110, § 110.2; rule 113, §§ 113.2, 113.6.1; rule 117, §§ 117.1.1, 117.3.) Promotion from one non-exempt position to another is governed by the same process, and also involves serving a probationary period. (SF CSC Rules, rule 110, § 110.3; see *id.*, rule 114, § 114.3 [referring to "promotive probationary employee"].) Dr. Kreutzer introduced no evidence that any of these additional procedures were followed when he was hired and promoted by the City.[7]

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[7] Dr. Kreutzer testified that he understood that he served a probationary period when he was first appointed to his class 2230 position in 1994, based on the fact that he was not permitted to use any vacation time for the first six months of his employment. He admitted, however, that he did not serve a

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As for the finding that no doctors had ever actually had their exempt positions reclassified, we fail to see what relevance this has to the question before this court. There was no evidence that any doctor, including Dr. Kreutzer, had sought reclassification to a non-exempt position and been denied that remedy. Moreover, the uncontroverted evidence was that if a position were reclassified, the incumbent would not necessarily retain it; rather, the position would be posted, and the incumbent would have to go through the civil service hiring process along with anyone else who wished to apply. This may help to explain the dearth of evidence that reclassifications had been sought or granted. More significantly, it underscores why the remedy for misclassification of a position cannot be simply to reclassify the incumbent as non-exempt and entitled to civil service protection, despite the fact that the incumbent was not initially appointed through the civil service process.

Finally, as already noted, Dr. Kreutzer testified he was unaware that the exempt nature of his position meant that his employment could be terminated at any time without cause and without any right to a civil service hearing. It may be that the City would have been better advised to make sure that the nature of Dr. Kreutzer's position was clear to him from the outset. But the fact remains that under the applicable civil service rules, Dr. Kreutzer's position was classified as exempt, and his employment was terminable at will.

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probationary period when he was promoted to the class 2232 position from which he was eventually released.

Dr. Kreutzer's misunderstanding on that subject cannot constitute grounds for affording him the right to a civil service hearing to challenge his release from a non-civil service position. In *Williams v. Department of Water& Power* (1982) 130 Cal. App. 3d 677, the court rejected a city employee's contention that she was entitled to remain in her non-civil service job unless removed for cause, based on her length of service in the position. The court held that the employee's unilateral expectation of continued employment was not reasonable, because "public employment is accepted subject to the statutory positions regulating it, and [the employee] knew or should have known of her job limitations expressly set forth in the city charter and in the civil service rules. [Citation.]" (*Id.* at pp. 682-683.)

Similarly, in *Shepherd v. Jones* (1982) 136 Cal. App. 3d 1049, the court held that a director of two local agencies whose position was governed by a policy stating that he " 'serve[d] at the pleasure' " of the boards of both agencies could be discharged from one of his positions, without a hearing, by the majority of the board of the employing agency. The court rejected the director's argument that "since a majority of the joint boards was needed to terminate him, he had a greater expectation of continued employment" (*id.* at p. 1058), reasoning that "in order to establish . . . a property interest" in continued employment, "an employee must 'have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' [Citation.]" (*Id.* at p. 1057.) Because the court rejected employee's interpretation of the policy as requiring the votes of both boards in order for him to be discharged from either position, it rejected his

contention that he had a right to a hearing before being terminated.

In short, neither the fact that Dr. Kreutzer performed significant administrative and supervisory duties, nor the fact that he was unaware that his position with the City was terminable at will, were sufficient to entitle him to a civil service hearing in connection with his release from his employment. Accordingly, Dr. Kreutzer was not denied due process by the City's refusal to grant him such a hearing.

B. Property Interest in Privileges at San Francisco General Hospital

The trial court found that Dr. Kreutzer's termination from his employment with the City was the direct cause of his loss of medical privileges at SF General. On appeal, the City contends that this finding is not supported by substantial evidence. We agree.

By his own account, Dr. Kreutzer continued to provide clinical services at SF General for a full year after his discharge by the City in June 2002. Moreover, the director of quality management at SF General testified without contradiction that according to SF General's records, Dr. Kreutzer's clinical privileges were not altered in any way from the time they were granted in the spring of 2002 until June 2003, when his employment through UCSF was terminated.

In Dr. Kreutzer's responsive brief on appeal, the only evidence he cites in support of the trial court's finding is his own declaration, which he filed in opposition to a motion for summary judgment in

related *federal* litigation, but which was never introduced into evidence at trial.[8] In that declaration, Dr. Kreutzer admitted that he continued to see adult patients at SF General after his release from his position with the City, but contended that his release precluded him from seeing the adolescent patients whom he had been treating in his capacity as a physician with the City. Thus, this declaration, even if it were in evidence, would not support the trial court's finding that Dr. Kreutzer's privileges at SF General were revoked as a result of his release.

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[8] In another declaration, filed in opposition to a motion for summary judgment in a separate lawsuit by Dr. Kreutzer against UCSF, he stated that he lost his privileges at SF General due to his termination from UCSF's Psychiatric Emergency Services department, and did not attribute the loss to his termination by the City. This declaration is included in the record as one of the City's trial exhibits, but it also apparently was never introduced into evidence.

We note in passing here, for the benefit of the parties' counsel, that our review of the record in this case has been somewhat hampered by the City's inclusion in its appendix of *all* of the parties' proposed trial exhibits, without any accompanying indication as to which exhibits were actually admitted in evidence, and under what exhibit number. This information can be determined from the reporter's transcript, but only with considerable effort. The better practice would be to include in the appendix only exhibits that were actually admitted, with their trial exhibit numbers appended, and exhibits that were offered but refused, as to which an issue is raised on appeal. (See Cal. Rules of Court, rule 8.124(b)(2)(A) ["[a]n appendix *must not* [¶] . . . [c]ontain documents or portions of documents filed in superior court that are unnecessary for proper consideration of the issues" (italics added)]; see also *id.*, rule 8.124(b)(3) ["All exhibits admitted in evidence, refused, or lodged are deemed part of the record, whether or not the appendix contains copies of them"].)

Rather, it would support only a finding that as a result of Dr. Kreutzer's release, he could no longer treat particular patients who were receiving treatment at SF General by virtue of their status as patients of one of the City's clinics. This was an inevitable corollary of Dr. Kreutzer's release by the City, however, and thus does not constitute an independent basis for concluding that the release violated Dr. Kreutzer's due process rights.

C. Due Process Right Arising Out of Stigma

In *Board of Regents v. Roth* (1972) 408 U.S. 564, a non-tenured faculty member at a state university sued for violation of his due process rights after the school declined to renew his contract without stating a reason. In rejecting the claim, the United States Supreme Court opined that " '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' [Citations.] In such a case, due process would accord an opportunity to refute the charge before University officials." (*Id.* at p. 573, fn. omitted.)

In keeping with this holding, our Supreme Court has adopted the rule that even when a public employee occupies "an at-will position, terminable without cause, . . . (and hence . . . [has] no due process *property* right to that position), it is well established that 'an at-will [public] employee's *liberty* interests are deprived when his discharge is accompanied by charges "that might seriously damage his standing and associations in his community" or "impose[] on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." '

[Citations.] When such a liberty deprivation occurs, a party has a right to a 'name-clearing hearing.' [Citation.]" (*Katzberg v. Regents of the University of California* (2002) 29 Cal. 4th 300, 305.)[9] In reliance on this line of cases, Dr. Kreutzer's amended complaint in this case included an allegation that his liberty interest in his reputation had been infringed due to the stigma created by his release from his employment with the City.

In its statement of decision, the trial court concluded that Dr. Kreutzer's liberty interest in his reputation had been infringed by his release from employment, even though the City gave no reason for the release, characterized it as non-disciplinary, and made no public charges of misconduct against Dr. Kreutzer. In support of this conclusion, the trial court relied on evidence that the release was in fact based on undisclosed stigmatizing reasons, including accusations of racism and patient neglect, which Dr.

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[9] In *Katzberg v. Regents of the University of California*, *supra*, 29 Cal. 4th 300, our Supreme Court held that deprivation of an employee's liberty interest in reputation does not give rise to any right to sue for monetary damages, as opposed to equitable or declaratory relief. We note, also, that such deprivation, standing alone, entitles the employee *only* to a name-clearing hearing, and not to reinstatement, back pay, or other equitable relief such as that awarded to Dr. Kreutzer by the trial court in this case. (See, e.g., *Board of Regents v. Roth*, *supra*, 408 U.S. at p. 573, fn. 12 ["Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons."]; *Murden v. County of Sacramento* (1984) 160 Cal. App. 3d 302, 310 [temporary, at-will employee discharged on basis of alleged sexual harassment was entitled to name-clearing hearing, but post-discharge hearing was adequate, because employee would not have been entitled to retain job even if he refuted charges].)

Kreutzer was never given a chance to rebut. The court also criticized the City for interfering with Dr. Kreutzer's efforts to obtain professional references to give to prospective employers,[10] and found that the mere fact that Dr. Kreutzer had been dismissed from his position without references would be perceived in professional circles as stigmatizing even though no reason for the dismissal was given.

On appeal, the City argues that under the applicable case law, Dr. Kreutzer's discharge did not violate his liberty interest because no stigmatizing charges were publicly disseminated, and Dr. Kreutzer was not precluded from obtaining other employment. We agree.

As the United States Supreme Court made clear in *Bishop v. Wood* (1976) 426 U.S. 341, the right to a name-clearing hearing does not arise when the reasons for an employee's discharge are not made public. In *Bishop v. Wood*, a police officer who was an at-will employee was discharged from his employment. He was told privately that his dismissal was based on failing to follow orders, poor attendance at training, causing low morale, and conduct unsuited to an officer. The court held that because this "communication was not made public, it cannot properly form the basis for a claim that [the officer's] interest in his 'good name, reputation, honor, or integrity' was thereby impaired." (*Id.* at p. 348, fn. omitted.) Even if the reasons given for the discharge were false, the court held, "the reasons

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[10] Dr. Kreutzer's former supervisor, Dr. DeRanieri, declined to give him a reference after his release. However, Dr. Kreutzer was able to obtain professional references from other sources.

stated to him in private had no different impact on his reputation than if they had been true," and thus did not "enhance[] . . . [the officer's] claim that his constitutionally protected interest in liberty ha[d] been impaired." (*Id.* at p. 349, fn. omitted.) As the court reasoned, "[a] contrary evaluation of [the officer's] contention would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake." (*Ibid.*)

The record in the present case is devoid of any proof supporting Dr. Kreutzer's claim of stigma. Dr. Kreutzer was released without any reason being given, and the reasons underlying his release were not publicly disclosed until Dr. Kreutzer challenged the decision.[11] As the Ninth Circuit held in *Hayes v. Phoenix-Talent School Dist. No. 4* (9th Cir. 1990) 893 F.2d 235, 236-237 (*Hayes*), even if the dismissal of an at-will government employee is based on stigmatizing charges, this does not implicate a liberty interest if the reasons are not disclosed to the public. (See also, e.g., *Bell v. Duffy*, *supra*, 111 Cal. App. 3d at pp. 650-651.)

Dr. Kreutzer seeks to counter this line of authority by contending that the City's act of releasing him without a reason was in and of itself

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[11] We recognize that the rationale underlying the City's decision to release Dr. Kreutzer has come to light in connection with this lawsuit. However, when an employer initially does not disclose its reasons for discharging an employee, but does so later in connection with litigation challenging the discharge, no liberty interest is infringed by the disclosure. (*Bishop v. Wood*, *supra*, 426 U.S. at pp. 348-349.)

stigmatizing, because potential employers would assume that there were reasons, and that they reflected adversely on Dr. Kreutzer's character. This argument is undercut by Dr. Kreutzer's own testimony that when one prospective employer was assured by a respected former colleague of Dr. Kreutzer's that the latter's release by the City had not been due to misconduct or incompetence on his part, the employer was willing to hire him. Similarly, Dr. Kreutzer testified that recruiters who contacted him to assess his interest in out-of-state jobs were initially concerned about the release, but were willing to offer him positions once he had assured them that it did not involve any misconduct.

In any event, Dr. Kreutzer's argument that his liberty interest was infringed by the release because prospective employers would assume that it was due to misconduct was squarely rejected in *Hayes*, *supra*, 893 F.2d 235. In that case, the dismissed employee submitted an affidavit from a fellow professional, stating that the employee's "early dismissal . . . implied that moral turpitude had been involved." (*Id.* at p. 237.) The court responded that "[a]n inference drawn from dismissal alone . . . is insufficient to implicate a liberty interest." (*Ibid.*)

A similar point was made by the United States Supreme Court in *Board of Regents v. Roth*, *supra*. In that case, the court noted that the lower federal courts in the case had "assum[ed] 'that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career[,]' [citation] [a]nd . . . that 'the substantial adverse effect non-retention is likely to have upon the career interests of an individual

professor' amounts to a limitation on future employment opportunities sufficient invoke procedural due process guarantees. [Citation.]" (408 U.S. at p. 574, fn. 13.) The court held, however, that "the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the [faculty member's] future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' [Citation.]" (*Ibid.*)

Moreover, despite his allegations of stigma, the record reflects that Dr. Kreutzer was able to obtain employment in his field after his release from his job with the City. He was hired by several different employers, and in fact earned more money after his release than he had before. A dismissal that merely "make[s] [an employee] less attractive to a prospective employer," but does not " 'foreclos[e] his freedom to take advantage of other employment opportunities,' " does not result in the deprivation of a protected liberty interest. (*Shepherd v. Jones*, *supra*, 136 Cal. App. 3d at p. 1061.) Accordingly, Dr. Kreutzer is not entitled to any relief on this basis.

III. DISPOSITION

The judgment is reversed, and the case is remanded with directions to the trial court to enter a new judgment in favor of the City, and to vacate its post-judgment order awarding attorney fees to Dr. Kreutzer. (See *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal. App. 4th 1106, 1120-1121.) The City is awarded its costs on appeal.

Ruvolo, P. J.

We concur:

Reardon, J

Sepulveda, J.

Trial Court:	San Francisco Superior Court
Trial Judge:	Hon. Ernest H. Goldsmith
Counsel for Appellant:	Dennis J. Herrera San Francisco City Attorney Elizabeth S. Salveson Chief Labor Attorney Danny Chou Chief of Appellate Litigation Terrence J. Howzell Michael J. Leon Guerrero Deputy City Attorneys
Counsel for Amicus Curiae California State Association of Counties and League of Cities on Behalf of Appellant:	Ann Miller Ravel Santa Clara County Counsel Kathryn J. Zoglin Deputy County Counsel
Counsel for Respondent:	Law Offices of Michael S. Sorgen, Michael S. Sorgen, Andrea Adam Brot

Appendix B-1

ENDORSED
FILED
San Francisco County
Superior Court
DEC 1 2006
GORDON PARK-LI, Clerk
BY: DAVID SWANSON
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

MICHAEL CHRISTOPH KREUTZER, Plaintiff, vs. CITY AND COUNTY OF SAN FRANCISCO, Defendant.	Case No.: CGC-04-431522 STATEMENT OF DECISION AND JUDGMENT

On May 22, 2006, the Court bifurcated the trial and on May 30 and 31, June 2, 4 and 5, 2006, Honorable Ernest H. Goldsmith presiding, heard testimony on equitable issues pertaining to Plaintiff's claim that the defendant violated his due process rights.

On June 27, 2006, after having considered the briefs and Defendant's motions for judgment based

on its contentions that the complaint was untimely filed under Government Code section 945.6 and that the pleadings were insufficient to warrant a Code of Civil Procedure section 1085 Writ of Mandate, the Court heard closing arguments. Plaintiff was represented by Michael S. Sorgen, while Defendant was represented by Deputy City Attorneys Michael J. Leon Guerrero and Terence Howzell. The Court issued its Tentative Statement of Decision on October 20, 2006 to which defendant responded in opposition and which the Court considered. Having heard and considered all evidence adduced at trial, the written and oral legal arguments, the Court hereby renders the following Statement of Decision and Judgment:

I. FINDINGS OF FACT

A. DUE PROCESS

1. It is uncontested that the plaintiff, Dr. Kreutzer, was employed as a Senior Physician Specialist by the Department of Public Health of the City and County of San Francisco from 1994 to September 2002, that plaintiff is a board-certified child psychiatrist who served as a medical director of several mental health clinics run by the Department of Public Health, and that he was classified in physician category 2232, a Senior Physician Specialist.

2. Plaintiff was terminated from his employment in September 2002 according to the Department of Public Health Human Resources records. His Letter of termination stated he was released from employment. The City contends that he was an exempt, at-will employee and could be

terminated or released, as they claim, for no reason and without recourse to a hearing.

3. The exempt classification derives from the City Charter Section 10.104, wherein employees exempt from civil service tests and lists are therefore without civil service procedural rights, most notably, no right to a hearing, inasmuch as they did not bear the burden of examination and priority lists. Notwithstanding this exemption, physicians do not take examinations.[1]

4. Plaintiff was told by letter dated September 6, 2002, that his services were no longer needed. There were no disciplinary or misconduct charges brought against Plaintiff in connection with the termination, nor evidence of any in the past.

5. Dr. Kreutzer was entitled to a hearing based on each of two separate grounds. First, he did in fact perform significantly supervisory and administrative duties which merit a hearing non-exempt physicians are entitled to. Second, his discharge was based on serious accusations of alleged misconduct which require a hearing to answer the accusations and question his accusers to allow his constitutional right to due process.

---

[1] The City claims that non-exempt physicians take examinations and exempt physicians do not. The claim is that non-exempt physicians are interviewed, their credentials are evaluated, and they are rated on a list based on comparison with other applicants, if any. "Exempt" physicians, as Dr. Kreutzer was classified, are interviewed, their credentials evaluated, and are apparently compared to other candidates, if any. There is no substantive difference in the hiring process between exempt and non-exempt physicians.

6. City Charter Section 10.104, Paragraph 13, excludes from exempt status those employees who perform significantly supervisory or administrative duties. Plaintiff contends he performed such duties and therefore was not an exempt employee and was entitled to a hearing in connection with his termination.

7. The City contends to the contrary, that he did not perform significantly supervisory or administrative duties and therefore remained an exempt employee. The City and their witnesses relied solely on the 2232 classification to conclude that Plaintiff did not perform significant administrative or supervisory duties.

8. City witnessed who so testified were Barbara Garcia, the appointing officer, Dr. Mitchell Katz, Director for the Department of Public Health; James Peavey, Senior Human Resources Officer of the Department of Public Health; and Edward Gazzano, Director of Human Resources of the Department of Public Health. The Court finds that these witnesses were lacking in credibility and that they performed no inquiry into and had no actual knowledge of the duties performed by Plaintiff and therefore had no foundational basis for their testimony that Plaintiff did not perform supervisory or significant supervisory or administrative duties.

9. Barbara Garcia was the official principally responsible for terminating Plaintiff. She made no inquiry to determine if he actually performed significant supervisory or administrative duties, even though Plaintiff was the medical director of three clinics with numerous professionals answering to him. She never spoke to Plaintiff. It appears to

the Court that her only inquiries regarding Plaintiff's status was with Mr. Peavey to determine or verify how Plaintiff could be terminated without notifying him of the reasons for the termination and without the necessity of a hearing.

10. The Court considered the testimony of Plaintiff that he did perform significant supervisory and administrative duties as medical director of three Department of Public Health clinics, wherein he testified that he supervised physicians, interns, and licensed medical health professionals and performed certain administrative duties.

11. The Court finds his testimony to be uncontradicted and high credible. Plaintiff's testimony was corroborated in part by that of his superior, Dr. Albert DeRanieri. The Court finds by a preponderance of the evidence that Plaintiff did in fact perform significant supervisory and administrative duties. Accordingly, the Court finds that Dr. Kreutzer came under the provisions of Paragraph 13 City Charter Section 10.104 and was not an exempt employee as claimed by the City and was entitled to a hearing in connection with the termination of his employment.

12. The Court has considered the contention of the City as stated by the Department of Public Health witness Mr. Gazzano, the Director of Human Resources, that Plaintiff could have sought reclassification to the 2233 classification, which is supervisory, if he were in fact performing supervisory or administrative duties. The Court finds that contention to be without merit. Dr. DeRanieri testified that he had not seen anyone move to that classification in 30 years.

13. As to the Broader due process issues and Plaintiff's constitutional rights, the Court finds that the facts attendant to the termination of the plaintiff indicate that the termination was disciplinary and that he was entitled to a hearing prior to his being fired. The Court finds that there were substantial property and liberty interests at stake under the California and United States Constitutions.

14. Barbara Garcia and Dr. Katz were informed secondhand that Plaintiff was racially insensitive in that he described an Hispanic patient as a malingerer, that he violated some unspecified administrative rule by contacting a janitor about filthy conditions, that he kept a patient waiting while he looked for the patient's file, and that he did not interact well with staff on certain occasions. They testified that these were the reasons for the dismissal, and it was unmistakably clear these were among the reasons that the City asserted after the fact for his dismissal.

15. The Court finds that each of these allegations gives rise to the right to a hearing and to answer the charges before termination from his processional position. It is noteworthy that Ms. Garcia and Dr. Katz did not discuss these charged with Plaintiff and that they initiated and approved a termination without any investigation other than listening to accusations and discussing them.

16. The evidence was convincing that the allegation that Plaintiff was a racist was paramount in his termination. This is an extremely serious accusation that deserved full investigation and a full hearing. Instead, there were behind the scenes accusations and decisions with no explanations. This

process violates all reasonable concepts of fairness in the employment context.

17. Dr. Mitchell Katz, an internist, made observations about the firing that raised several issues that reasonably demanded a hearing. His testimony was based in part on Plaintiff's demeanor in a conversation after being fired from his position of eight years and Plaintiff's desperate attempt to convince Dr. Katz that he was not a racist. Dr. Kreutzer's termination was obviously a result of unsubstantiated accusations that he acted in a racist manner in the conduct of his duties. Yet, Barbara Garcia instructed the personnel department that the termination was non-disciplinary, thus insuring that her true motives for firing Dr. Kreutzer would not be exposed.

18. Dr. Katz dismissed Plaintiff's letter written post-firing regarding Department of Public Health actions which clearly indicated that he had been accused and targeted as a racist and which set forth statistics which would demand an investigation as to whether or not Dr. Kreutzer as a targeted minority in his work unit as he had alleged. Dr. Kreutzer is a heterosexual white male. These post-termination observations by Plaintiff should have demanded investigation and a hearing. Plaintiff was left with accusations to which he had no opportunity to respond, rumor, innuendo, and no job.

19. Plaintiff contends that his property interests under California Constitution, article I, section 7, have been violated by termination of his employment as a medical director in the Department of Public Health and the termination of his medical staff privileges as a child psychiatrist at the San

Francisco General Hospital and City mental health clinics, which resulted directly from his termination of employment. Accordingly, he could no longer practice his medical specialty, nor treat former clinic patients privately in these medical settings. Yet, nobody from the City ever even discussed with Dr. Kreutzer the post-termination treatment needs of his patients, some of whom he had been treating for years.

20. The City argues it took no action to remove Plaintiff's medical privileges at the hospital, but this Court finds to the contrary. The Court finds that the termination was the direct cause of the loss of medical privileges at San Francisco General Hospital.

21. Plaintiff was never formally charged with any wrongdoing, and the City relies on this to avoid responsibility for its action which devastated Plaintiff's professional life. Yet, the firing of Plaintiff severely damaged his professional reputation, deprived or compromised his ability to work in his specialized profession, and stigmatized him in his profession.

22. This Court finds, despite the lack of formal charges involving such things as moral turpitude concerning the racism accusations, incompetence, failure to properly attend patients, and other serious charges, all of which has stigmatizing effect, that all of those accusations demanded a hearing. The City purposely avoided bringing these accusations and facts before public scrutiny and giving the plaintiff the chance to answer the charges and to question his accusers. In fact, the City coordinated efforts to deny Plaintiff any professional references from his

supervisor pertaining to the entire 8 years of his employment, and also from the clinic's program director who had worked with him prior to the termination. Preventing Dr. Kreutzer from obtaining a professional reference had a particularly devastating effect which exacerbated the effect of telling inquiring prospective employers only his dates of employment. The Court can also infer that, but for the unsubstantiated reasons underlying the wrongful termination and the denial of a reference, the City would have properly classified Dr. Kreutzer according to his actual responsibilities which included significant supervisory and administrative duties.

23. There were, in fact, serious charges and accusation against Plaintiff which were not formally advanced, which the Court finds to be an attempt by the Department of Public Health to avoid having to justify their actions in a hearing and which violated basic due process rights.

24. The firing of a professional of Dr. Kreutzer's standing after eight years for no stated reason, withholding professional references, and telling prospective future employers only the dates of employment, is a kiss of death for that professional as it will be assumed that the applicant is incompetent, immoral, or worse.

25. No matter what employment Plaintiff secured or secures in the future, his reputation has been and will always be damaged, as he has testified, and his professional opportunities will be forever compromised.

26. Dr. Kreutzer filed a grievance regarding his release and the union took it to arbitration. However, the arbitrator accepted the City's determination that the termination was not disciplinary and ruled in the City's favor. Notably, James Peavey, the head of Personnel, testified that he and another representative of the Department of Public Health Personnel Office attended the arbitration hearing for purposes of observation. Yet, Mr. Peavey affected virtually no knowledge about the termination at trial except that Barbara Garcia wanted the Plaintiff fired.

27. Dr. Kreutzer then appealed his release to the Civil Service Commission, which Ms. Kate Favetti, the Executive Director of the Commission, testified was supposed to provide oversight over the City's various human resources and personnel departments. Instead of providing such oversight, however, the Civil Service Commission just sent Dr. Kreutzer's appeal over to Department of Public Health's Human Resources office to determine whether this appeal was "appropriate" or whether Civil Service had jurisdiction. This meant that the very agency that fired Dr. Kreutzer was asked to determine the propriety of the appeal, as the Civil Service Commission declined to do so even though the Commission was charged with that responsibility.

28. Ms. Favetti testified that she always deferred to the City department the complaint was against. In fact, she had been employed as a Department of Public Health personnel analyst herself for many years before she became the Executive Director of Civil Service. She said she

never had a dispute about the propriety of Civil Service review where the outcome is determined by the City department which fired or took action against the City employee, and whatever dispute they did have, they would be able to work it out. The Civil Service Commission never held a hearing to determine its own jurisdiction in matters such as this. The appeal process was "meaningless" as applied to Dr. Kreutzer.

B. SUFFICIENCY OF THE PLEADINGS

29. The City contends that Plaintiff's pleadings are insufficient for the Court to issue a writ because they are unverified and because there is no explicit request for a Writ of Mandate but only a more general request for reinstatement.

30. The Court finds the lack of verification unimportant after it has heard five days of sworn testimony relating to the Plaintiff's claim that his due process rights were violated and the reinstatement is the appropriate remedy.

31. In addition, the Court finds: (1) The language in the pleading is sufficient for the Court to issue a writ under Code of Civil Procedure section 1085 reinstating Plaintiff with make-whole pay and benefits; (2) the City was not prejudiced by any alleged deficiency in the pleadings; (3) the pleadings were sufficient to give the City full and complete notice of the Plaintiff's claims; and (4) the pleadings were sufficient to support all finding and relief set forth herein.

C. TIMELINESS OF THE COMPLAINT IN LIGHT OF GOVERNMENT CODE SECTION 945.6

32. Anthony Bothwell, Esq. filed a claim against the City on behalf of Plaintiff on March 4, 2003. The City presented evidence to the effect that Ms. Tracy Doughty-Lucey, then a claims adjuster in the City Attorney's Office, mailed a denial of the Plaintiff's claim to attorney Bothwell on April 10, 2003. Denial of the claim triggers a six-month period in which to file a lawsuit based on the claim. The complaint in this case was filed on May 18, 2004. Therefore, the city claims the complaint was not timely filed. Notwithstanding the fect that Plaintiff prevailed in a demurrer and motion for summary judgment on this issue, this Court heard and considered extensive testimony and documentation on this issue at trial.

33. Ms. Doughty-Lucey completed a declaration of mailed pertaining to the alleged April 10, 2003, denial of Plaintiff's claim. The declaration reads in pertinent part:

"That on April 10, 2003, I served:

NOTICE OF ACTION UPON CLAIM

by placing a true copy thereof in a envelope addressed to:

Anthony P.X. Bothwell, Esq.
350 Bay Street, Ste. 100—PMB 314
San Francisco, CA 94133

And by then sealing and depositing said envelope with postage thereon fully

prepaid, in the United States Mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 10, 2003, at San Francisco, California.

_____

Traci A. Doughty

DECLARATION OF SERVICE BY MAIL"

34. Attorney Bothwell testified that he did not receive the denial. He further testified that he sent two amendments to the claim to the City by certified mail, on April 17 and May 19, 2003. He identified copies of these letters. One of the return receipts was signed for by Ms. Doughty-Lucey's secretary and the other by her supervisor. However, she testified that she had never seen these amendments, didn't know where they were, nor what happened to them. The Court finds that these amendments to the claim were sufficient to put the City on notice that attorney Bothwell and Plaintiff never received a denial of the claim purported to have been sent on April 20, 2003. In fact, they had every reason to believe the claim was under continuing investigation, inasmuch as Ms. Doughty-Lucey testified that she wrote Mr. Bothwell a letter shortly after the claim was filed that a review was underway.

35. The Court also finds that Ms. Doughty-Lucey's declaration of mailing, signed under oath, is

incorrect and does not serve to have conveyed notice of the denial of claim. She testified at the trial that she did not, in fact, mail the notice of denial of claim by placing it in the United States mail. She further testified that she placed the denial in a place, not a repository, where other people handle the disposition of letters. Mr. Henry Texson, a mail clerk, testified that he regularly picked up mail in Ms. Doughty-Lucey's office and that some mail is picked up stamped and some is not stamped. Ms. Doughty-Lucey could have, but did not, declare that she was familiar with the business practices of the agency and had personal knowledge of mailing. Her declaration stating that she placed the denial in the U.S. mail was, by her own admission, not true. The alleged mailing process was fatally flawed and the Court finds that the City did not give notice of the denial of claim by the alleged April 10, 2003, mailing.

36. Had the City sent any response, no matter how cryptic, to attorney Bothwell's certified mail amendment letters stating that the claim had been denied, that would have put Mr. Bothwell and Plaintiff on notice that the six-month time period to file a complaint was running. Mr. Doughty-Lucey testified that she took no action when she received the amendment letters because the claim was already denied and just put them in the file. The City failed to respond at all. The Court finds that the City was on notice that Plaintiff had not received the alleged April 10, 2006, mailing and had not been notified of the denial. Mr. Bothwell and Plaintiff reasonably relied on the lack of response to the two amendment letters to believe the City was continuing to investigate the claim and had taken no action on it. The Court finds this constitutes

detrimental reliance by attorney Bothwell and Plaintiff, that this reliance was reasonable, and that the city's actions and inaction creates an estoppel under *Shuer v. San Diego*, (2004) 177 Cal. App. 4th 476 at 486.

37. Accordingly, the Court finds that the City failed to give notice of the denial of Plaintiff's claim inasmuch as the alleged April 10, 2003, mailing did not constitute notice and the six-month period to file a complaint under the Government Code did not start to run. In addition, the Court finds that the city estopped from asserting the defense that Plaintiff's complaint was untimely filed beyond the six-month period. The Court finds the complaint in this action was timely filed.

II. CONCLUSIONS OF LAW

1. Plaintiff's ability to earn a living was severely compromised. No matter what employment Dr. Kreutzer may take or has taken, he cannot enjoy his full professional potential due to the City's actions. Not only did the Department of Public Health wrongfully deny Plaintiff a hearing, its wrongful actions were the direct cause of Plaintiff's loss of privileges at San Francisco General Hospital. Also, San Francisco General Hospital may have violated its own bylaws by terminating Plaintiff's privileges.

2. Plaintiff had a property interest as a non-exempt employee arising from the Civil Service requirement that his employment only be terminated for just cause after notice and a due process hearing. He also had a property interest arising from the provisions of the San Francisco general Hospital by-

laws that if his medical privileges were affected adversely that he would have a right to notice and a hearing. Plaintiff's property interests were violated.

3. In light of the Court's finding's regarding the adverse impact of the termination on Plaintiff's professional reputation, he also had a liberty interest which entitled him to notice and hearing. Plaintiff's liberty interest was violated.

4. This Court has authority to order a plaintiff reinstated as a remedy for violations of due process in a wrongful termination case. *See Luby v. City and County of San Francisco*, 98 Cal. App. 3d 340, 347-349 (Cal. Ct. App. 1979) (holding that the City and County violated the due process rights of plaintiffs by firing them without a hearing to refute the charges against them, and ordering the plaintiffs reinstated); *Burton v. Cascade School District Union High School No. 5*, 512 F.2d 850, 852-53 (9th Cir. 1975) (holding that reinstatement in discretionary in wrongful termination cases unless the plaintiff was fired for exercising First Amendment rights or because of racial discrimination).

5. This Court has authority to order a plaintiff reinstated as a remedy for violations of due process in a wrongful termination case. *See Lucich v. City of Oakland*, 19 Cal. 4th 494, 498 (Cal. Ct. App. 1993) (affirming a jury finding that the City of Oakland wrongly denied plaintiffs' merit promotions, and order that plaintiffs be deemed promoted to the positions they had sought even though the jury rejected the claim of discrimination); *see also Brown v. Trustees of Boston University*, 891 F.2d 337, 360 (1st Cir. 1989) (upholding a district court's order that Boston University grant tenure to plaintiff after a

jury found that the University's denial of tenure to plaintiff resulted from sex discrimination); *Kunda v. Muhlenberg College*, 621 F.2d 532, 549 (3rd Cir. 1980) (affirming the district court's power, under title VII, to place a victim of discrimination in the place she would have occupied but for the discrimination, and upholding the order to promote plaintiff to a tenured position).

6. Dr. Kreutzer is entitled to be made whole by being placed in the position he would have occupied but for the wrongful conduct of the City and County. Had the City and County properly classified Dr. Kreutzer as a permanent, non-exempt employee, commensurate with his actual supervisory and administrative duties, Dr. Kreutzer could not have been fired without any reason or hearing. He would have been entitled not to be terminated except for just cause. Furthermore, instatement to a non-exempt position is the only way to insure that Dr. Kreutzer will not again be a victim of wrongful termination and denied the right to a hearing and an opportunity to defend himself from the arbitrary, capricious, unlawful, and unconstitutional treatment such as he has experienced. Given the past actions of the Department of health in this case, the Court finds that there is a danger that it would be a useless gesture to merely reinstate Dr. Kreutzer to a position classified as exempt and subject to "release" under the conditions he experienced. The City has abused the "release" procedure to avoid answering for unlawful employment practices. The City and County shall therefore reinstate Plaintiff to a permanent, non-exempt position consistent with the professional, administrative, and supervisory

responsibilities the Court has found that he previously performed.

7. Defendant argues that Plaintiff cannot be instated at a higher position without having complied with the normal Civil Service procedures for applying to and being appointed to the position. Defendant cites *Allen v. State Board of Equalization*, 43 Cal. App. 2d 90 (Cal. Ct. App. 1941) and *Pinion v. State Personnel Board*, 29 Cal. App. 2d 314 (Cal. Ct. App. 1938) to support this argument. However, *Allen* and *Pinion* involve factual situations and legal theories quite different from the present case. *Allen* and *Pinion* involved employees who claimed a legal right to be reclassified to a higher position on the sole basis of having performed the duties of the higher job classification. By contrast, Dr. Kreutzer does not seek reinstatement to a higher position merely because he performed the duties of the higher position, but as a remedy for unlawful termination in violation of due process and as protection from further violations. Defendant's cases are thus distinguishable and not controlling.

8. Defendant also cites *Snow v. Board of Administration of the Public Employee's Retirement System*, 87 Cal. App. 3d 484 (Cal. Ct. App. 1978) and *Hastings v. Department of Corrections*, 110 Cal. App. 4th 963 (Cal. Ct. App. 2003) to bolster this argument. These cases are also distinguishable. The plaintiffs in these cases sought reclassification on other grounds not in conjunction with reinstatement as a remedy to an unlawful termination resulting from a violation of their constitutional right to due process.

9. Dr. Kreutzer is entitled to reinstatement to a high position as the only remedy that will make

him whole for his wrongful termination and safely reemployed without repetition of the unlawful treatment he has been subjected to. Reinstatement to a high position is appropriate when, but for the unlawful termination, plaintiff would have been appointed to a higher position. *See Lucich*, 19 Cal. 4th at 498; *Brown*, 891 F.2d at 360; *Kunda*, 621 F.2d at 549. This Court has made findings that Dr. Kreutzer performed significant administrative and supervisory duties that, under the City's charter, made Dr. Kreutzer a non-exempt employee, but the City never appropriately classified him. This Court also found that Dr. Kreutzer was terminated without a hearing, based on unsubstantiated and uninvestigated allegations of racism and misconduct. In order to make Dr. Kreutzer whole for his wrongful termination, the City shall appoint Dr. Kreutzer to a permanent, non-exempt position, which he would have occupied but for the City's wrongful conduct.

10. Based on the inaccurate declaration of Ms. Doughty-Lucey, her testimony in court, and the testimonies of Mr. Texson and Mr. Bothwell and the exhibits which attended their testimony, the Court finds the City has failed to produce sufficient evidence that a notice of denial of claim in questions was actually placed in the United States mail. Therefore, the Court finds that the City failed to give notice of the denial of claim.

11. Accordingly, the six-month time period for filing the complaint did not commence. Therefore, the complaint was timely filed.

12. The Court finds separately and alternately that the claim amendment letters which Mr. Bothwell sent to the City (by certified mail with

return receipt) were the equivalent of actual inquiries and put the City on notice that the Plaintiff did not know the status of the claim. Thus, the City is estopped from asserting that it gave notice of its rejection of the claim.

13. Therefore, the filing of the complaint was timely.

III. JUDGMENT

WHEREFOR IT IS SO ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:

1. Plaintiff was wrongfully denied a hearing both before the Committee which enforces the San Francisco General Hospital By-laws and the Civil Service Commission. The Court notes that a Civil Service hearing was indeed scheduled for May 5, 2003, but canceled as a result of Department of Public Health's incorrect insistence that Plaintiff was an exempt employee.

2. Plaintiff was beneficially interested in his employment. He timely and fully exhausted his administrative remedies. He had no adequate remedy at law. Thus, a writ mandating reinstatement is the appropriate remedy and shall be effective ten (10) days after this statement of decision and judgment are filed.

3. As ancillary relief to the reinstatement, the Court orders that Dr. Kreutzer be reinstated, both to his employment and to his medical privileges, and that he be made whole by being awarded the back pay and benefits to which he would have been entitled had he been classified and paid in

accordance with his actual duties and accorded the due process that was required by law.

4. In light of the uncontradicted testimony that Plaintiff performed significant administrative or supervisory duties, Dr. Kreutzer shall be reinstated retroactively in a permanent, non-exempt position that reflects his previous functional responsibilities as medical director, such as the 2235 or similar positions. If the classification to which Dr. Kreutzer is appointed is at any time abolished, Dr. Kreutzer's non-exempt status will not be affected and he will be classified in accordance with his administrative or supervisory duties.

5. There shall be no retaliation against Dr. Kreutzer is assignment, pay, benefits, or any other matters. The City and County will, in good faith, utilize Dr. Kreutzer's skills to meet medical needs.

6. The City's Motion for Judgment on the Pleadings is denied.

7. The City's Motion for Judgment based on its assertion that the Complaint was untimely filed is also denied.

8. The Court will retain jurisdiction to monitor and enforce this Judgment.

DATED: December 1, 2006

ERNEST H. GOLDSMITH

ERNEST H. GOLDSMITH
Judge of the
Superior Court

Appendix B-22

CERTIFICATE OF SERVICE BY MAIL

(Code Civ. Proc. 1013a(4))

I, David V. Swanson, a deputy clerk of the Superior Court for the City and County of San Francisco, certify that:

1) I am not a party to this action;

2) On Dec. 1, 2006, I served the attached:

STATEMENT OF DECISION AND JUDGMENT

by placing a copy thereof in a sealed envelope, addressed as follows:

Michael S. Sorgen, Esq.
Law Offices of Michael S. Sorgen
240 Stockton Street, 9th Floor
San Francisco, CA 94108

Michael J. Leon Guerrero, Deputy City Attorney
Terence J. Howzell, Deputy City Attorney
Office of the City Attorney
Fox Plaza
1390 Market Street, 5th Floor
San Francisco, CA 94102-5408

and,

3) I then placed the sealed envelope in the outgoing mail at 400 McAllister Street, San Francisco, CA 94102-4514 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

DATED: Dec. 1, 2006

GORDON PARK-LI, Clerk

By: David V. Swanson Deputy

Appendix C-1

Court of Appeal, First Appellate District, Div. 4
No. A116389

S167293

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MICHAEL CHRISTOPHER KREUTZER,
Plaintiff and Respondent,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED
DEC 10 2008
Frederick K. Ohlrich Clerk
Deputy

GEORGE
Chief Justice